The Lamar Company, LLC d/b/a Lamar Advertising of Janesville *and* International Union of Painters and Allied Trades, Local 802, AFL–CIO, Petitioner. Case 30–RC–6254

October 31, 2003

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to an election held January 5, 2001, and the Hearing Officer's Report and Supplemental Report recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 9 for and 7 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, adopts the Regional Director's findings[2] and recommendations, as explained below, and finds that a certification of representative should be issued.

For the reasons stated by the hearing officer, we agree with his recommendations to overrule objections alleging that the Union or its agents interfered with the election by promising employee Steven Jones a leather jacket if the Union won the election (Objection 5), engaging in electioneering (Objection 6),[3] misrepresenting the election bar rule (Objection 9),[4] and threatening an employee with a loss of benefits (Objection 10).[5] We address the remaining objections below.

Bestowal of Benefits (Objection 1)

The hearing officer recommended overruling Objection 1, which alleges that the Union held meetings at an impermissible location and purchased excessive food and beverages for the employees. The Employer contends that the four or five meetings the Union held at Diamond Jim's Isabella Queen were objectionable because the establishment is a strip club that features lap dancing and private "fantasy rooms." According to Union Business Manager William Moyer's unrefuted testimony, however, Diamond Jim's and Isabella Queen are separate establishments—a bar and grill and a strip club, respectively—located in the same building. Moyer testified without contradiction that the Union only held meetings in the bar and grill area and paid only for refreshments consumed during the meetings. In agreeing with the hearing officer's finding that the Union's holding meetings at this establishment was not objectionable, we find it significant that all of the meetings held there were restricted to the bar and grill area and that the Petitioner paid only for the drinks and food consumed at the meetings.[6]

The Employer also contends that the Union's paying for refreshments and meals at meetings, particularly the dinner for employees and their spouses at a restaurant called The 615 Club, constituted an objectionable bestowal of benefits. Like the hearing officer, we disagree.

Moyer spent approximately $400 on refreshments at five meetings at Diamond Jim's and two meetings at Jumbo's Pub. The Union also spent $815 (including a $200 tip) on dinner at the The 615 Club for approxi-

[1] The Employer withdrew Objections 2, 7, 8, 11, and 12.

On September 30, 2002, the Board remanded the case for a supplemental hearing to determine whether there had been any attempt to coerce the testimony of employee Jason Dygart prior to the initial hearing and, if so, how it affected his testimony. The Board made no decision on the merits of the objections at that time. For the reasons stated by the hearing officer in his supplemental report, we agree that there is no evidence that anyone attempted to coerce Dygart's testimony.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] The hearing officer found that Union Business Manager Moyer's telling an employee on the morning of the election to "think long and hard about his vote because the Union [would] be the one making his wages" did not constitute objectionable electioneering. That finding has not been excepted to.

Further, we can discern no threat of job loss in Moyer's statement, as the Employer alleges in its exceptions. At most, we find, the remark misrepresented the Union's "control" over employees' wages, and is not objectionable under the standards set forth in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

[4] The hearing officer found that a union document did not misrepresent election bar rules, but he failed to determine whether Jones' showing the document to coworkers on the morning of the election constituted impermissible electioneering by an agent (*Milchem, Inc.*, 170 NLRB 362 (1968)), or by an employee (*Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992)). As explained below, we find that Jones was not an agent of the Union, and that in any event, his conduct occurred away from the polling area and prior to the opening of the polls, and therefore was not objectionable.

[5] Although the record establishes that Electrical Workers Business Representative Leo Sokolik telephoned employee Daniel Voit at Moyer's request, and therefore may have been acting as a special agent of the Union, Voit's testimony fails to establish that he was threatened with a loss of employment, pension, or other benefits.

[6] Photographs and a telephone book advertisement tend to support the Employer's exception that the establishment, Diamond Jim's Isabella Queen, is one business entity. However, nothing in the record contradicts the witnesses' testimony that the strip club—though situated in the same building as the tavern—is physically separate and that union meetings were restricted to the tavern.

mately seven employees, their spouses or significant others, and Moyer and his wife. Moyer testified that the Union customarily invites employees and their spouses to a nice dinner during an organizing campaign so that spouses' questions and concerns about representation may be addressed. He said that here, however, at the request of most of the people who attended the dinner, the group did not discuss the Union.

The Board has long held that a union's or an employer's provision of refreshments and dinners during organizing campaigns is within the realm of permissible conduct. *Chicagoland Television News, Inc.*, 328 NLRB 367 (1999); *Fashion Fair, Inc.*, 157 NLRB 1645 (1966), enfd. 399 F.2d 764 (6th Cir. 1968). We find that the cost of the dinner was not exceptionally high, even including the tip.[7] Nor do we deem the aggregate cost of the dinner and the refreshments paid for at other meetings to be excessive.[8] Accordingly, we find no merit in the Employer's Objection 1.

Threats of Bodily Harm
(Objections 3 and 4)

The hearing officer recommended overruling Objections 3 and 4, which allege that prounion employees interfered with the election by threatening employee Jason Dygart with bodily harm if he did not vote for the Union. Like the hearing officer, we reject that contention.

Dygart testified that in mid-December coworkers Jones and Jim Peterson told him that they would "kick his ass" if he did not vote for the Union.[9] He explained that he was not intimidated and that "everybody has fun" and "everybody messes around." Dygart said that he did not tell anyone about the comments until he was questioned by the Employer's attorney after the election because it was "not a problem to [him]" and the two employees never came toward him in a physically threatening manner.[10]

In support of its contention that Jones' and Peterson's conduct was objectionable, the Employer alleges that Jones was an agent of the Union.[11] It argues that Jones was one of two or three employees who distributed union literature and that he informed employees about upcoming union meetings and hosted two meetings at his home. However, the unit in which the election was conducted was a relatively small one comprised of 16 employees, and Moyer relied on employees who attended the meetings to take leftover handouts back to the Employer's facility for unit employees who did not attend the meetings to read. We agree with the hearing officer that these facts do not establish agency status. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804 (6th Cir. 1989) (handing out literature and informing coworkers about meetings); *L & A Juice Co.*, 323 NLRB 965 (1999) (holding union meetings).

Because Jones and Peterson were not union agents, their comments to Dygart must be assessed under the Board's standard for third-party conduct. The Board and the courts recognize that conduct by third parties is less likely to affect the outcome of the election than party conduct, and that because unions (and employers) cannot control nonagents, the equities militate against setting aside elections on the basis of conduct by third parties. Hence, the Board will set aside an election on the basis of third-party threats only if the conduct is so aggravated that it creates a general atmosphere of fear and reprisal rendering a free election impossible. *Cal-West Periodicals*, 330 NLRB 599, 600 (2000); *Q. B. Rebuilders, Inc.*, 312 NLRB 1141 (1993); *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). The burden of proof lies with the objecting party. *Cal-West Periodicals*, supra, 330 NLRB at 600.

In *Westwood Horizons Hotel*, supra, the Board set forth the following factors to be considered in assessing the seriousness of a third-party threat: (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were disseminated widely within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was rejuvenated at or near the time of the election.

The third-party conduct standard applies even where, as here, there was a one-vote electoral margin. See *Cal-West Periodicals*, supra, 330 NLRB at 600. See also

[7] The Employer argues that the hearing officer erred in calculating the value of the dinner by failing to include the sizable gratuity left by Moyer. By our calculations the dinner and tip average about $51 per person, rather than $39 per person as found by the hearing officer.

[8] Moyer stated that as few as "four employees and an average of six to nine employees" attended the seven meetings. Thus, it is impossible to calculate precisely how much the Union spent on refreshments for each employee. Suffice it to say that we do not deem the possible figures or the aggregate sum to be extraordinary.

[9] Dygart was the brushcutter on a three-man crew with sign construction employees Jones and Peterson.

[10] Dygart testified, in the hearing on remand, that he informed Posting Supervisor/Manager Robert Hamilton about the threat shortly after the election. Hamilton testified that he in turn told General Manager Jeff Smith about the threat. Dygart's testimony about postelection conversations, though inconsistent, does not affect our analysis. Although Hamilton's title includes the word "supervisor" and the hearing officer stated that he was one, nothing in the record establishes that Hamilton exercises supervisory authority as set forth in Sec. 2(11) of the Act. Accordingly, we disavow the hearing officer's suggestion that Hamilton interrogated Dygart following the election.

[11] The Employer does not allege that Peterson was an agent.

Urban Telephone Corp., 196 NLRB 23 (1972). The Employer does not contend that there was a "general atmosphere of fear and reprisal," relying instead on its argument, which we have rejected, that Dygart was coerced by an agent of the Union. Arguably, our inquiry could end here. Even assuming, however, that the proper focus of inquiry is on the threat in relation to Dygart alone—given that a one-vote switch could have changed the outcome of the election—we do not find the conduct objectionable.

Turning to the *Westwood* analysis, two of the factors preclude finding an overall atmosphere of fear and coercion, putting aside the potential coercion of Dygart alone. With respect to the breadth of the threat, Dygart's testimony indicates that Jones and Peterson addressed their remarks solely to him; there is no evidence that Jones and Peterson made the same or similar threats to any other employee. Nor is dissemination of the threat an issue. Dygart testified that he did not tell anyone else of the threat until after the election, and no other employee witnesses indicated that they were aware of the threat prior to the election.[12] We are not concerned here, then, with the potential coercion of any employee except Dygart.

In addressing the four remaining *Westwood* factors, the Board applies an objective test: whether, under all of the circumstances, a reasonable employee in Dygart's position would have been put in fear by the threat.[13]

With respect to the nature of the threat, Dygart testified that the only conduct Jones and Peterson engaged in was uttering the threat, explaining that "they didn't come [at] me or anything." He also testified that "everybody messes around" in this manner. His testimony is not refuted. Thus, Jones' and Peterson's words were not accompanied by otherwise menacing conduct and were of a nature that was commonplace in this work setting and reasonably understood not to be taken seriously.

Viewed objectively, a threat by one employee to another to "kick ass," *without more*, is mere bravado that is unlikely to intimidate the listener. The Board and courts recognize that in a hotly contested election, "a certain measure of bad feeling and even hostile behavior is probably inevitable." *Cal-West Periodicals*, supra, 330 NLRB at 600, citing *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984). Thus, in *NLRB v. Bostik Div., U.S.M. Corp.*, 517 F.2d 971, 973–974 (6th Cir. 1975), the court agreed with the Board that threats to "kick ass" were not objectionable. The court reasoned that:

> The threats objected to were of the nature of those not uncommon among workers in an industrial setting. These comments, even in the context of an upcoming Union election, are not the type that would be expected to have a coercive impact. Such irresponsible threats are almost inevitable in the course of a heated election campaign and most employees doubtless expect such exchanges.

See also *Leasco, Inc.*, 289 NLRB 549 fn. 1 (1988) (employee's threat to "kick [a manager's] ass" is "a colloquialism that standing alone does not convey a threat of actual physical harm"). The nature of the threat, then, does not weigh in favor of finding it objectionable.

Even assuming, however, that the threat was an actual threat of physical harm, our assessment of Jones' and Peterson's capability of to carry it out and its likely impact do not support a finding that the threat was objectionable. In this regard, the record does not indicate the relative size or stature of Jones, Peterson, or Dygart. Had there been a remarkable disparity, these facts would likely have been brought out at the hearing. Additionally, there is no evidence that Jones or Peterson, whether singly or together, had a history of fighting or other violent behavior at or away from work. Thus, there is no evidence that Jones and Peterson were inclined to make good on their threat or were capable of doing so.

Nor does the record support a finding that Dygart or any other employee likely acted in fear of the threat, considered objectively. Jones and Peterson were not shown to be hostile or otherwise menacing, this workplace was one in which "everybody messe[d] around," and, as found earlier, most threats to "kick ass" in the workplace generally are more bark than bite.

Finally, with respect to the last relevant factor, there is no evidence that the threat, which was made about 3 weeks before the election, was rejuvenated at a time closer to the election.[14]

[12] Contrary to the Employer's assertion, the "small plant doctrine" of dissemination does not apply to this case. The small plant doctrine is an unfair labor practice construct that permits an inference of employer knowledge of union activities in circumstances which have not been shown to exist here. *Hadley Mfg. Corp.*, 108 NLRB 1641, 1650 (1954). *Stannah Stairlifts, Inc.*, 325 NLRB 572 (1998), cited by the Employer, is inapposite. The doctrine was not employed there. Although the bargaining unit in that case was a small one, there was no issue of dissemination because the threat was made "within earshot of the entire four-man unit." Here, by contrast, there is concrete evidence that the threat was *not* disseminated.

[13] The hearing officer erred in rejecting these objections based primarily on Dygart's testimony that he was not intimidated by the comments made by Jones and Peterson. By considering Dygart's subjective testimony as conclusive evidence that no threat occurred, the hearing officer misapplied the *Westwood* factors.

[14] Dygart denied that there was more than one conversation. Although he also testified that he "just kept saying well I'm going to vote

In sum, based on our application of the considerations set forth in *Westwood Horizons Hotel*, and focusing on the single employee whose vote might have been determinative, we overrule Objections 3 and 4.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union of Painters and Allied Trades, Local 802, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time construction employees, electricians, billposters, sign painter-artists, sign erectors and brushcutters employed by the Employer at or out of its 5101 Highway 51 South, Janesville, Wisconsin facility; excluding all office employees, clerical employees, sales employees, charting manager, managerial employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

Dated, Washington, D.C. October 31, 2003

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

no . . . [a]nd they just kept coming at me with it," it is not clear whether this was one incident or repeated incidents, and if repeated, when in relation to the election the incidents occurred.